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No. 1627

In the

Supreme Court of the United States

OCTOBER TERM, 1970

WILLIAM E. DAVERN, JR.,

Petitioner,

vs.

CIVIL SERVICE COMMISSION OF THE CITY OF CHICAGO, and ORLANDO W. WILSON, Superintendent of Police of the City of Chicago,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

RICHARD F. McPARTLIN,
Suite 2211,
33 N. Dearborn Street,
Chicago, Illinois 60602,
Attorney for Petitioner.

SIDNEY Z. KARASIK,
Of Counsel.

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WILLIAM E. DAVERN, JR.,

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CIVIL SERVICE COMMISSION OF THE CITY OF CHICAGO, and ORLANDO W. WILSON, Superintendent of Police of the City of Chicago,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered in this cause on November 17, 1970, as modified after denial of rehearing on January 27, 1971.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported in 47 Ill. 2d 469 and is reprinted in Appendix A hereto. The Supreme Court's ruling reversed the decision of the Appellate Court of Illinois, reported in 115 Ill. App. 2d 93, 253 N.E. 2d 149, which is reprinted as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on November 17, 1970. A petition for rehearing was denied on January 27, 1971, but the Supreme Court, nevertheless, modified its opinion in a manner significant for this Petition for Certiorari (see Appendix A, p. 3a).

Jurisdiction of this Court is invoked under 28 U.S.C., §1257(3). Questions under the United States Constitution sought to be reviewed by this Court were timely and properly raised in the court below.

QUESTIONS PRESENTED

1. May an administrative agency bar a person from public employment on the basis of an unspecified and unsupported charge, and when this is judicially set aside, proceed, upon remandment, with a hearing on totally different matters concerning which the person was given no advance notice?

2. Did the Illinois Supreme Court act constitutionally in suggesting findings that an agency could have made, where the agency itself made no findings, and upon such speculation deprive one of his right to employment?

3. Was the order of decertification supported by competent and substantial evidence, as required under the due process clause?

STATEMENT

In 1960, after five years of service as a patrolman in the Chicago Police Department, petitioner resigned* from the force.

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* The circumstances of this resignation are adequately described in the opinion of the Appellate Court, Appendix B, pp. 9a, 24a, 25a, 115 Ill. App. 2d 93, 95, 109.

In 1965, petitioner took a Civil Service examination for the position of patrolman, passed, and was certified for appointment to that position. In response to notice, he appeared before the Civil Service Commission and in a brief, informal session (without counsel for either party), petitioner learned that the Police Department recommended disapproval of his certification.

At this initial hearing, reference was made to a certain Police Department report concerning the plaintiff (but not shown to him), which contained conclusions of an unnamed lie detector examiner, stating that plaintiff had lied in answer to certain questions put to him concerning a police-burglar scandal that arose in the Summerdale Police District in 1960, the year in which petitioner had resigned. The Civil Service Commission was also told that petitioner had always denied involvement in any police wrongdoing and was never accused in connection with the Summerdale scandal.

Petitioner was subsequently notified by letter that his certification was disapproved and his name stricken from the eligible list.

Petitioner then commenced an action by filing a complaint under the Illinois Administrative Review Act (Ill. Rev. Stats. 1965, Chap. 110, pars. 264-279) seeking reversal of the order of the Commission.

Section 6 of Rule II, of the Civil Service Rules governing disqualification from service, provides in pertinent part that "proof of . . . bad character, dissolute habits,

immoral conduct . . . shall be grounds for . . . removal from an eligible register. . . ."*

The gist of petitioner's complaint in administrative review was that no competent, relevant evidence was introduced against petitioner at the hearing before the Commission which constituted proof of any of the aforesaid grounds for removal from the eligible list.

The Circuit Court reversed the Civil Service Commission on the ground that on the record of the initial hearing, Respondent had no authority under its Rule II, §6 to disapprove plaintiff's certification. The cause was remanded to the Commission for the taking of additional evidence.

At the second hearing, both the Police Department and Petitioner were represented by counsel, one witness testifying for each side, subject to cross-examination, and documents were admitted into evidence.

At this more formal hearing, the Police Department abandoned any further reference to the original alleged

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* The full text of Section 6 of Rule II is as follows:

"Section 6. Disqualifications. Proof of false statements made in any application or in any experience rating sheet or other statement given in an examination or of the violation of any statute or of any rule, regulation or instruction of the Commission pertaining to an examination, or of bad character, dissolute habits, immoral conduct, or of dismissal for cause from any public service shall be grounds for excluding an applicant from any examination, or for omission or removal from an eligible register, or for dismissal from the service after certification, provided, however, that no provision of this Section 6 shall have any application to the discharge during the period of probation provided for in Section 10 of the Civil Service Act of persons appointed to the classified service pursuant to such Section 10."

lie detector report. Without notice to petitioner, and over objection of petitioner's counsel, the Police Department then sought to show that petitioner carelessly or deliberately mishandled certain evidence, a Polaroid Camera, in 1959, at the time of the apprehension of Richard Morrison, the "babbling burglar", who had touched off the Summerdale scandal.

The testimony of the Police Department's sole witness relating to the camera episode, together with an official Police Report dated February 16, 1960, spun a web of circumstance and innuendo which purportedly connected petitioner to the mishandling of the camera evidence and the thwarting of prosecution of Morrison (who was later found to have been involved in criminal activities with certain Police Officers other than the petitioner).

The Police Department also introduced another document, without objection from petitioner, which consisted of a written statement taken from and signed by the petitioner on March 22, 1960, which detailed his version of the events concerning the confiscation, inventory and handling of the camera. It contained petitioner's denial of ever having worked with the burglar, or working with any Chicago Police officer who did work with him, receiving anything from a burglar to conceal a crime, knowing of Morrison's activities with Police Officers before January 1960, or being told of such activities by a fellow policeman.

The details of the camera episode are fully and meticulously set forth in the Appellate Court's opinion and require no restatement here.

At the conclusion of the Department's case, and without hearing petitioner's testimony, the Commission denied

petitioner's motion for a directed finding, and affirmed its original decision.

Thereafter petitioner testified in his own behalf, in which he noted that before his voluntary resignation in May 1960, he was never suspended, that no criminal charges were placed against him, that one of his partners at the Summerdale station received a suspension for activities in the Morrison case, but that that partner was now a sergeant in the Police Department, and that another detective had been convicted of switching evidence in the Morrison case. He also noted that in 1960, his regular furlough was not delayed as were the furloughs of other officers from the Summerdale station, who were later discharged from the force.

Upon the conclusion of the additional evidence, the Commission made no findings of fact, but filed the supplemental record with the Circuit Court in the administrative review action. The Circuit Court again reversed the decision of the Commission and held it to be contrary to the manifest weight of the evidence. The Circuit Court ordered plaintiff's immediate restoration to the eligible list.

The Commission appealed to the Appellate Court of Illinois, contending that the Commission's prior order was correct in that plaintiff lacked the requisite character for appointment to the Chicago Police Department. The Appellate Court notes in its opinion:

> "*In its brief,* the Commission discloses, *for the first time,* its reasons for decertifying plaintiff. It contends that the record in this case demonstrates that plaintiff is of 'bad character' within the meaning of Rule II, section 6 of its rules. . ." (quoted above).

> "Specifically the appellants contend that the plaintiff is of 'bad character' because: (1) he did not place the Polaroid Camera serial number on Summerdale's inventory sheet; (2) he was one of the recovering officers and did not place his mark on the camera; (3) he removed the camera from the Custodian's office on May 27, 1959, and it was not returned until June 2, 1959; (4) he was not the arresting officer and hence violated the rules of the Chicago Police Department by removing the camera on May 27, 1959; (5) he resigned while under investigation; (6) the records of the Police Department indicate that he lied in making certain answers to questions posed to him in a polygraph examination." (App. B, p. 19a, 115 Ill. App. 2d at 103, 104) (Emphasis added)

The Appellate Court states that although "bad character" is not defined in the Commission's rule governing disqualifications, that, nevertheless, the Commission "must have the power to decide what is bad character in a particular case justifying the decertification of an applicant for his Civil Service appointment."

After analyzing the evidence in relation to each of six contentions made by the Commission, in its appellate brief, the Appellate Court concluded that they were not supported by the manifest weight, that some of the evidence was not competent and that the contentions were without merit. The Appellate Court affirmed the trial court's judgment restoring plaintiff to the eligible list and certification.

The Supreme Court of Illinois granted leave to appeal, holding that the Appellate and Circuit Courts "incorrectly found the Commission's actions to be against the manifest weight of the evidence," and remanding with direction to confirm the Commission's original order striking plaintiff's name from the eligible list.

The Supreme Court, in its initial opinion stated:

> "The Commission **found** plaintiff to be of 'bad character' within the meaning of Section 6 of Rule II of its rules. . . ."

On petition for rehearing, which was denied, the Court significantly amended its opinion to read as follows:

> "The Commission **could have found** plaintiff to be of 'bad character' within the meaning of Section 6 of Rule II of its rules . . ."

REASONS FOR GRANTING THE WRIT

I.

THE CIVIL SERVICE COMMISSION DECERTIFIED PETITIONER AND PERMANENTLY BARRED HIS ELIGIBILITY FOR EMPLOYMENT AS A POLICEMAN WITHOUT A FAIR HEARING, WITHOUT FINDINGS OF FACT, AND WITHOUT STATED REASONS FOR ITS ACTION, ALL IN VIOLATION OF DUE PROCESS.

(a) The hearings were not fair.

Although petitioner nominally was afforded two "hearings" to "show cause why [his] certification to the position of patrolman should not be disapproved", *neither* hearing was conducted in a "meaningful" or fair manner comporting to the requirements of procedural due process.

The first hearing, conducted without counsel, adjudicated petitioner's rights solely on the basis of a written report of an unnamed, faceless lie detector examiner. No foundation was laid for the use of the polygraph evidence, the examiner was not produced nor tendered for cross-examination. Hence, the lie detector evidence was indisputably incompetent as hearsay and inadmissible, even before an administrative tribunal, and properly compelled the trial court's remandment to the Commission for taking of additional evidence to support the Commission's disapproval order. The order itself was never produced nor made part of the record.

The second hearing, although more formal in character and attended by counsel, still fell short of the minimal requirements of due process in these particulars:

(1) Instead of pursuing the charge that petitioner had lied in the polygraph test, the Commission abandoned that course, and took an entirely different tack by presenting *new charges* without notice or specificity of the nature of the grounds for disqualification.

(2) At no time during the hearing on the "new charges", including the camera episode, was petitioner ever informed that the Police Department considered him to be a man of "bad character" or possessing the other traits which would authorize his disqualification. No findings of fact or conclusions were pronounced by the Commission at the conclusion of its hearing, or even revealed to the Circuit Court, in respondent's answer to the Complaint for Administrative Review. Not until the Commission filed its brief in the Appellate Court was petitioner first apprised of the alleged reasons for the disapproval action.

(3) Instead of pointing to the findings of fact or conclusions in its adjudicative order, respondent, in the Appellate Court, advanced "bad character" as an after-the-fact rationale for striking petitioner's name from the eligible list. The Appellate Court saw fit to consider, and point-by-point answer, all of the contentions which were merely arguments offered by the Commission's counsel, to show that even if said contentions had actually been *found* by the Commission, they were nevertheless without merit and not substantiated by the evidence. In seeking and obtaining leave to appeal from the Illinois Supreme Court, the plaint of respondents was that the "Appellate Court perpetuated the error of the trial court by improperly affording *protective rights to the plaintiff which he did not have under the law.*" (sic)

In its opinion before rehearing, the Supreme Court refers to the provisions of the Illinois Administrative Re-

view Act that "the findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct." The opinion states that the sole question is "whether the Commission's finding that plaintiff's name was properly stricken from the eligible list, was sufficiently supported." The opinion then stated: "The Commission *found* plaintiff to be of 'bad character' within the meaning of Section 6 of Rule II."

On petition for rehearing, when confronted with the stark fact that the record was barren of any "findings and conclusions of the administrative agency", the court denied the rehearing, but conveniently substituted the phrase "*could have found*" for "*found*". The amendment of the Supreme Court's opinion is a mute but eloquent confession to the lack of findings and conclusions of the administrative agency which were essential to support the Commission's adjudication of the petitioner's employment rights.

In accepting the appellate legal contentions of the Commission in lieu of administrative factual findings, the Supreme Court gives sanction to procedural defects and due process short-comings which tainted the Commission's proceedings.

It is fundamental that an administrative decision based upon information not specified or disclosed in advance of hearing to the aggrieved party, violates procedural due process, especially where the evidence is prejudicial to the party. *Simmons* v. *U.S.*, 348 U.S. 397, 75 S. Ct. 397, 99 L. Ed. 453.

In *Simmons,* the question presented was whether a draft registrant, seeking exemption as a conscientious objector, was entitled, under the Selective Service Act, to

be furnished by the Department of Justice with a fair resume of adverse information in an FBI report in the file of the Department. The Court sustained the registrant's contention that the Department's failure to furnish the resume invalidated his I-A classification and conviction for failure to submit to induction. Citing *U.S.* v. *Nugent,* 346 U.S. 1, 73 S. Ct. 991, 97 L. Ed. 1417 (1953) the court said, at p. 405:

> "A fair resume (of adverse information) is one which will permit the registrant to defend against the adverse evidence, to explain it, rebut it, or otherwise detract from its damaging force. The Congress, in providing for a hearing, did not intend for it to be conducted *on the level of a game of blindman's bluff.*" (Emphasis added).

(b) Petitioner was deprived of the right of confrontation.

This Court has said that where an administrative body makes use of derogatory evidence concerning an aggrieved party's past behavior, of which evidence he may be unaware, and of which he is given short notice, or an inadequate opportunity to answer, "a prime requirement of any fair hearing" is missing and the procedure offends due process because "the right to a hearing means the right to a meaningful hearing." (*United States* v. *Gonzales,* 348 U.S. 407, 75 S. Ct. 409, 99 L. Ed. 467 (1955)).

The right to a "meaningful hearing" in those circumstances also necessarily includes the right to confront the derogator (*Willner* v. *Committee on Character and Fitness,* 373 U.S. 96; 83 S. Ct. 1175, 10 L. Ed. 2d 224 (1963); *Garrott* v. *United States,* 169 Ct. Cl. 186, 340 F.2d 615 (1965)). See *Jay* v. *Boyd,* 351 U.S. 345, 373-375; 76 S. Ct. 919, 935-936; where Justice Frankfurter, dissenting in an alien deportation case where the Attorney General had used confidential information not disclosed to the alien, said,

"He, (the Attorney General) cannot shelter himself behind the appearance of legal procedure—a system of administrative law—and yet infuse it with a denial of what is basic to such a system."

(c) Petitioner was taken by surprise in having to meet additional "new charges".

In the instant case, following the Circuit Court's first mandate, petitioner expected the Commission to present lie detector evidence in competent form; i.e., that these were the charges he was expected to meet. Instead, petitioner was surprised by the wholly different charges, without having been given adequate notice or a reasonable opportunity to "explain . . . rebut . . . or otherwise detract from [their] damaging force." (*Simmons* v. *United States,* 348 U.S. 397, 405).

In this posture the instant case parallels *In re Ruffalo,* 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117, where a trial lawyer was charged with misconduct by the Ohio Board of Bar Commissioners in a disbarment action. During the proceeding, an additional charge of misconduct was added over petitioner's objection. Although petitioner was granted a continuance in order to have time to respond to the new charge, the motion to strike the additional charge was denied.

This Court held that "this absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges, deprived petitioner of procedural due process." (p. 552).

(d) Petitioner was entitled to a reasonably definite and specific statement of reasons for denying his application for employment.

As above noted, respondents obtained leave to appeal to the Illinois Supreme Court on the dubious proposition

that petitioner, a former member of the police force, had no protective safeguards to his job under the law. Implicit in that contention was the assumption that the Police Department selects its own members and may accept or reject eligibles in its unbridled discretion—notwithstanding the provisions of the Illinois Civil Service Act, the basic purpose of which is to establish a merit instead of spoils system.

Rule II, Section 6 of the Rules of the Chicago Civil Service Commission, quoted supra page 4, was designed to protect eligible persons in the circumstances of the petitioner. The rules of the Commission are binding upon it and all concerned.*

Under Rule II, Section 6, it was obligatory for the Department to submit proof of one of the disqualifying factors before removal from an eligible register could be authorized. Not only did the Department fail to make the requisite proof, but the failure is underscored and confirmed by the ever-shifting position of the Department and the failure of the Commission at any time (before appeal) to express *any* reason for disapproving plaintiff's certification and striking his name from the eligible register. Whether the reason was supposed to be contained in plaintiff's alleged lies in a polygraph test, or his resignation "during" the Summerdale investigation, or his alleged mishandling of the camera in the Morrison case, or his alleged "bad character", the reason was not furnished and the proof was not made. An implied reason, or one founded on mere innuendo and speculation, is not sufficient for due process. Without a finding at the adjudicatory level a court might

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* (See *Ptacak* v. *People ex rel Deneen,* 94 Ill. App. 571, Aff'd 194 Ill. 125; *Cartan* v. *Gregory,* 329 Ill. App. 307; *People ex rel. King* v. *Gregory,* 335 Ill. App. 570.)

sustain an agency for a reason not intended by the agency, and thus deprive the employee of a meaningful review consistent with procedural due process.

Independently of the specific rights which petitioner had under the Illinois Civil Service Statute and the rules of the Civil Service Commission,* petitioner's rights under the Fourteenth Amendment of the Federal Constitution could not be blithely overlooked. Petitioner had the right to know the reasons for the Commission's disapproval and to be protected against the arbitrary action of the persons administering the Civil Service Act. While a State may bestow upon an administrative officer or administrative agency the duty to protect the public health, safety and welfare by examining into the fitness of an individual to engage in an occupation, it cannot exclude such person from any occupation in a manner or for reasons that contravene the due process clause of the Fourteenth Amendment. (*Schware* v. *Bd. of Bar Examiners,* 353 U.S. 232, 77 S. Ct. 752, 1 L. ed. 2d 796). Such a person is entitled to a reasonable, definite statement of the grounds for denial of his application. (*Bennett* v. *Arizona State Board of Public Welfare,* 95 Ariz. 170, 388 P. 2d 166, 168 (1963); see also *Scoggin* v. *Lincoln University,* 291 F. Supp. 161,

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* A person on the eligible list may compel his appointment to a vacancy (*Peo. ex rel. Caslin* v. *Geary,* 330 Ill. App. 172). An eligible may compel the Commission to correct an eligible list to show his true standing thereon (*Peo. ex rel. Jacques* v. *Sheehan,* 32 Ill. App. 2d 14; *People* v. *Frazier,* 219 Ill. App. 234). The discretion of the Department head is not unfettered (*Peo. ex rel. Vestuto* v. *O'Connor,* 351 Ill. App. 539; *Peo. ex rel. Walker* v. *O'Connor,* 351 Ill. App. 545; *Donahoo* v. *Board of Education,* 413 Ill. 422, 425, 426; *Peo. ex rel. Barrett* v. *Fond du Lac State Bank,* 310 Ill. App. 28).

169, 170 (D.C., Mo.) (Students not informed of specific grounds for dismissal)).

In the instant case, the exclusion of petitioner from his further employment as a policeman leaves the permanent impression that he is unfit for his calling (or any occupation) because he is a man of "bad character" or "dissolute habits", or "immoral conduct". The consequences visited upon petitioner of an adjudication without findings is to replace his police star with a "badge of infamy", which he is sentenced to wear the rest of his life. (See: *Wieman* v. *Updegraff,* 344 U.S. 183, 190-191, 73 S. Ct. 215, 219, 97 L. Ed. 216 (1952)).

It may be that a person has no constitutional right to a public occupation, a principle epigramed by Justice Holmes' in 1892, that a man "has no constitutional right to be a policeman." (*McAuliffe* v. *City of New Bedford,* 155 Mass. 216, 220, 29 N.E. 517). But such a person cannot be disqualified from his public employment by an adjudicative procedure which deprives him of due process or any of those constitutional rights which he possesses as a person and citizen. (See: *Sherbert* v. *Verner,* 374 U.S. 398, 404 83 S. Ct. 1790, 1794, 10 L. Ed. 2d 965, 971; *Keyishian* v. *Board of Regents,* 385 U.S. 589, 605, 87 S. Ct. 675, 685, 17 L. Ed. 2d 629, 642; *Pickering* v. *Board of Education,* 391 U.S. 563, 568, 88 S. Ct. 1731, 1734, 20 L. Ed. 2d 811; *Brukiewa* v. *Police Commissioners of Baltimore City,* 257 Md. 36, 263 A. 2d 210).

II.

THE ILLINOIS HIGH COURT ILLEGALLY AND UNCONSTITUTIONALLY MADE AN INDEPENDENT DETERMINATION OF FACTS NOT FOUND BY THE CIVIL SERVICE COMMISSION.

The lack of a fair hearing, in the particulars above noted, was not cured by the subsequent judicial review where, for the first time, petitioner was informed by the Commission of its alleged reasons (but not its findings) for his decertification and removal from the eligible list.

Although given an opportunity by remandment to hold a proper hearing and make a proper adjudication, the Commission did not do so. Twice it failed to comply with its rules and with due process. Unless the Commission's findings and reasons are made on the evidentiary, adjudicative level, the fact of a subsequent review in court, does not afford petitioner a timely opportunity to make an evidentiary response.

Since the Commission failed to make findings as the basis for its actions, it compelled the reviewing court to do the Commission's work and supply convenient reasons for the action. Courts of review are not empowered to make an independent investigation of evidence to develop new facts not found by an administrative agency, or to re-determine the factual issues made by the proof. The same doctrine has many times been enunciated by the Illinois Supreme Court (although violated in the instant case): *Menning* v. *Department of Registration,* 14 Ill. 2d 553, 560-561; *AT&S Ry. Co.* v. *Commerce Commission,* 397 Ill. 406, 413; *West End Savings & Loan Assn.* v. *Smith,* 60 Ill. 2d 523, 525; *Borreson* v. *Dept. of Public Welfare,* 368 Ill. 425, 432-433.

III.

THERE IS NO SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE ORDER OF DECERTIFICATION.

The conclusions of an administrative agency may not be arbitrary and capricious and its findings must be based on substantial evidence, in order to satisfy constitutional due process. *United States* v. *Carlo Bianchi & Co.,* 373 U.S. 709, 83 S. Ct. 1409, 10 L. Ed. 2d 652 (1963); *Esteban* v. *Central Missouri State College,* 290 F. Supp. 622 (D.C., Mo. 1968).

Although the Illinois Supreme Court mentions six "reasons" which purportedly show "bad character" (the ground for decertification first advanced in Defendant's Appellate Court Brief) an analysis of those reasons in the light of the record establishes that the Court misapprehended the facts in finding that petitioner violated the rules of the department, and that in fact there was no sufficient competent evidence to warrant his removal from the list. Such an analysis was comprehensively presented in the Appellate Court's opinion (App. B).

CONCLUSION

For the foregoing reasons, it is respectfully urged that a Writ of Certiorari be granted.

Respectfully submitted,

RICHARD M. MCPARTLIN
Attorney for Petitioner

SIDNEY Z. KARASIK,
Of Counsel

APPENDIX A

OPINION OF SUPREME COURT OF ILLINOIS

Mr. Chief Justice Underwood delivered the opinion of the court:

Plaintiff, William E. Davern, Jr., passed an examination given by the Civil Service Commission of the City of Chicago (hereinafter referred to as Commission) for the position of patrolman in the Chicago Police Department, and was, on September 27, 1965, certified for appointment to that position.

On October 19 plaintiff was directed to appear before the Commission on October 29 "to show cause why your certification to the position of patrolmen should not be disapproved." Plaintiff appeared as directed, without counsel, and answered questions by the members of the Commission, and no witnesses were presented against him. Thereafter, on November 4, plaintiff was advised by letter that his certification had been disapproved, and his name was to be stricken from the eligible list and from the register.

He then commenced this action by filing his complaint under the Administrative Review Act (Ill. Rev. Stat. 1965, ch. 110, pars. 264-279) seeking reversal of the order of the Commission. The cause was remanded to the Commission by the trial court for the taking of additional evidence, pursuant to which an "investigation" before the Commission was held on November 2, 1966. The Commission confirmed its original decision of decertification and removal. Upon receipt of the supplemental record the circuit court of Cook County reversed the

decision of the Commission and held it was contrary to the manifest weight of the evidence. It ordered the plaintiff's immediate restoration to the eligible list and certification.

The Commission appealed to the appellate court which affirmed the judgment of the circuit court (115 Ill. App. 2d 93) and held that the plaintiff could be removed from the eligible list and the register only upon presentation of proof of cause for removal and the Commission's decision was against the manifest weight of the evidence. We granted defendants' petition for leave to appeal. 42 Ill. 2d 584.

The Administrative Review Act provides that agency findings on questions of fact are "prima facie true and correct." (Ill. Rev. Stat. 1967, ch. 110, par. 274) We have construed this provision to limit the function of the reviewing court to ascertaining whether the findings and decisions of the administrative agency are against the manifest weight of the evidence. (See e.g., DeGrazio v. Civil Service Com. of Chicago, 31 Ill. 2d 482; Logan v. Civil Service Com., 3 Ill. 2d 81; Harrison v. Civil Service Com. of Chicago, 1 Ill. 2d 137; Drezner v. Civil Service Com. 398 Ill. 219.) The courts will not reweigh the evidence, but are limited to a determination whether the final decision of the administrative agency is just as reasonable in light of the evidence presented. (Fantozzi v. Board of Fire and Police Comm'rs of Villa Park, 35 Ill. App. 2d 248, affirmed 27 Ill. 2d 357.) Neither the appellate court nor the trial court may substitute its judgment for that of the administrative agency. (See e.g., DeGrazio v. Civil Service Com. of Chicago, 31 Ill. 2d 482; Olsen v. Civil Service Com. of Chicago, 28 Ill.

App. 2d 146; Miglieri v. Lee, 16 Ill. App. 2d 545.) The sole question before us, therefore, is whether the Commission's finding that plaintiff's name was properly stricken from the eligible list was sufficiently supported so that it cannot be said to be contrary to the manifest weight of the evidence.

The Commission could have found* plaintiff to be of "bad character" within the meaning of section 6 of Rule II of its rules which provides in part as follows: "Disqualifications. Proof of * * * bad character, dissolute habits, immoral conduct * * * shall be grounds for * * * removal from an eligible register * * *."

The appellate court made a comprehensive review of all the facts and evidence offered in the two hearings before the Commission (115 Ill. App. 2d 93), and in view of the fact that the petition for leave to appeal, upon which defendants elected to stand in the instant proceedings, did not contain a reargument of those facts, we deem it sufficient to merely highlight the contentions and facts applicable thereto.

The plaintiff, prior to the certification here in question, had previously been a member of the Chicago Police Department for a period of approximately five years. In April of 1959, while assigned to the Summerdale Police District, he participated in the arrest and investigation of Richard Morrison, who was later found to have been involved in criminal activities with certain police officers other than the plaintiff. These activities of Morrison and those police officers drew national attention.

All of the alleged misdeeds of the plaintiff are predicated on activities which took place in relation to the arrest and investigation of Morrison. "The only witness

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* In the original opinion this read "The Commission found".

for the Police Department was Marcus McGill, a sergeant in the Department, who testified that the plaintiff's name was mentioned as a result of the police investigation into the statements and allegations made by Richard Morrison. The plaintiff was a detective on April 14, 1959, the night that Morrison and Jerry Bossuyt were arrested in the Summerdale Police District. The arresting officers were Handley and Gilmartin. The detectives involved as investigating officers were the plaintiff, Kann, and Norcott. The following property was found in Morrison's car: a Polaroid camera; bottles of liquor; cigarettes; and approximately $475 in coins. The arresting officers and the detectives escorted Morrison, Bossuyt, and the seized property to the Summerdale Police Station where the evidence was inventoried. Through police channels, it was learned that the items matched a description of merchandise taken in the burglary of Carmen Sakol Motors, which was located in another Police District. Morrison and Bossuyt were then detained on a burglary warrant. Continuing, McGill stated that although the property seized should have been taken at the earliest possible time from the Summerdale Station to the custodian's office located in Central Police Headquarters, the merchandise remained at Summerdale for six days before it was sent to the proper place. In addition, the Polaroid camera was entered on Summerdale's Recovered Property Inventory Sheet without its serial number being listed. No detective placed his private marking on the camera either. Police records showed that at the end of May, 1959, the plaintiff removed the camera from the Custodian's Office and kept it out for five or six days." 115 Ill. App. 2d 93, 98-99.

The plaintiff resigned on May 10, 1960, allegedly in deference to the wishes of his father, a physician, due

to the constant adverse publicity regarding the police department. Specifically, the Commission urged in the appellant court proceedings that the record in this case demonstrates that the plaintiff is of "bad character" for the following reasons: "(1) he did not place the Polaroid camera's serial number on Summerdale's inventory sheet; (2) he was one of the recovering officers and did not place his mark on the camera; (3) he removed the camera from the Custodian's Office on May 27, 1959, and it was not returned until June 2, 1959; (4) he was not the arresting officer and hence violated the rules of the Chicago Police Department by removing the camera on May 27, 1950; (5) he resigned while under investigation; (6) the records of the Police Department indicate that he lied in making certain answers to questions posed to him in a polygraph examination." 115 Ill. App. 2d 93, 104.

In answer to the charges of failure to place the serial number of the Polaroid camera on Summerdale's inventory sheet and failure to place an identifying mark on the camera as required by Chicago Police Department rules, it is argued that nothing in the record reveals why these duties were solely that of plaintiff when there were four other officers participating in the arrest and investigation. No good reason is suggested and none occurs to us as to why the noncompliance of the other officers should excuse plaintiff's noncompliance. Rule 338 of the Chicago Police Department requires property held as evidence to be inventoried by "the arresting officer", and Rule 339 requires such property to be properly marked by "the recovering officer." These terms are not defined in the rules and plaintiff contends that even though he was one of five officers who accompanied

the accused and the evidence to the police station, it has not been established that he was either "the recovering officer" or "the arresting officer" within the meaning of the rules. It is indisputable, however, that plaintiff either was the arresting officer or he was not. If he was not the arresting officer, he violated Rule 338 when he obtained the camera from the police custodian for use in court, because that rule requires that evidence necessary for use in court be obtained by "the arresting officer".

As to the contention that the camera was not returned to the police custodian for a period of five days after its removal by plaintiff for use in court, he explains that the court date was Wednesday, May 27, 1959, and due to the lateness of the day, he returned the camera to the Summerdale station for pickup rather than to the custodian's office. Then, allegedly because of the intervening Memorial Day week-end, the camera was not returned until Tuesday, June 2, 1959. Rule 338 states in part that "[W]hen the evidence is not disposed of in court, the arresting officer shall return the evidence to the police custodian." This rule clearly requires the officer who checks out the evidence to return it to the police custodian. Even if the camera could not have been returned promptly on Wednesday, May 27, the occurence of Memorial Day on Saturday, May 30, can scarcely be thought to justify delaying return until the following Tuesday, June 2. Nor does the fact that plaintiff was on medical leave during this period serve to exonerate him in view of the fact that he was also on medical leave when he obtained the camera from the police custodian.

Certain police officers other than plaintiff were found to have been criminally involved with Morrison, and one

officer was convicted of tampering with the very evidence in question here. No matter how innocently plaintiff actually acted, or how widespread the loose practices at that time as to the handling of evidence, plaintiff's non-compliance with the departmental rules and regulation and his subsequent resignation during the investigation of the Summerdale Police District need not be disregarded. In light of all of the circumstances surrounding the Summerdale investigation, the Commission was not obliged to accept plaintiff's explanation for his resignation.

The contention that plaintiff lied when answering questions posed to him in a polygraph examination is based upon a letter sent to the Commission by the Director of Personnel of the Police Department containing the alleged conclusions of an un-named polygraph operator. The results of the lie-detector test were never tendered to the Commission and the polygraph operator did not testify. While we agree with the appellate court that this evidence was hearsay, we are of the opinion that there remains sufficient competent evidence to support the Commission's decision.

The appellate and circuit courts incorrectly found the Commission's actions to be against the manifest weight of the evidence. The judgments are accordingly reversed and the cause remanded to the circuit court of Cook County with directions to confirm the Commission's order striking plaintiff's name from the eligible list.

Reversed and remanded, with directions.

Mr. Justice Kluczynski, dissenting.

Mr. Justice Ward took no part in the consideration or decision of this case.

APPENDIX B

OPINION OF THE APPELLATE COURT OF ILLINOIS

Mr. Presiding Justice Lyons Delivered The Opinion Of The Court.

The plaintiff, William E. Davern, Jr., an applicant for the position of patrolman in the Chicago Police Department, commenced this action by filing his complaint under the Administrative Review Act (Ill. Rev. Stat. 1965, ch. 110, Sec. 264-279 inclusive) seeking to reverse an order of the Civil Service Commission of the City of Chicago (hereinafter referred to as the Commission) which had disapproved his certification to the position of patrolman and had struck his name from the eligible list and Civil Service Register. After remanding the cause to the Commission for the taking of additional evidence pursuant to ch. 110, Sec. 275 (1) (g) and receiving a supplemental record in which the Commission affirmed its original decision of decertification, the trial court reversed the order of the Commission, holding it to be contrary to the manifest weight of the evidence, and ruled that the plaintiff was entitled to have his name immediately restored to the eligible list and register for the position of patrolman and was entitled to be certified and appointed to the position, to perform the duties thereof, and to receive the salary appropriated therefor, until removed as provided by law. The defendants appeal from this judgment and seek to reverse it.

The plaintiff passed an examination given by the Commission for the position of patrolman. On September 27, 1965, the Commission certified him for appointment to

that position. Shortly thereafter, the plaintiff received a letter, dated October 19, 1965, from the Chief Examiner and Secretary of the Commission which directed him to appear before the Commission on October 27, 1965, "to show cause why your certification to the position of Patrolman should not be disapproved." The plaintiff appeared as directed. He was without counsel and no witnesses testified against him. At this time, no attorney represented the Police Department. The plaintiff merely answered the questions asked of him by the Commission. These proceedings were informal and brief.

The plaintiff explained to the Commission that he resigned from the Chicago Police Department on May 10, 1960, at a time when he was assigned to the Summerdale Police District and was a patrolman having detective duties. At the time of his resignation he had been a member of the police force for approximately five years. He and his brother, also a patrolman and assigned to the same shift at the Summerdale Station as the plaintiff, resigned from the Police Department on the same date in deference to the wishes of their father, a physician, who thought it best that his sons leave the force due to the constant adverse publicity regarding the Police Department which he was receiving from his patients. Both the plaintiff and his brother then entered private industry until the plaintiff took the patrolman examination, apparently in 1965, and was certified for the position in that year.

During the questioning of the plaintiff by members of the Commission, it became apparent that the Commission had been advised by the Chicago Police Department that it recommended that the Commission disapprove the plaintiff's certification. At this first hearing

before the Commission, its members referred to a Police Department report concerning the plaintiff which was not shown to him at this time and which indicated, according to the conclusions of an unnamed lie detector examiner, that the plaintiff had lied when he answered "No" to the following questions put to him in 1960 during a polygraph examination given to him with his consent: "Did you ever receive any burglary proceeds since you were a policeman; did your detective partner at the Summerdale Police Station ever tell you that he actually knew Richard Morrison was working with policemen?"

The Commission also was advised by the Police Department that the plaintiff always denied being involved in any police wrongdoing and was never accused of any criminal offense as a result of the police investigation into the activities at the Summerdale Police District. At the conclusion of this informal hearing, the plaintiff was told that the Commission wished to take the matter under consideration and would advise him of its decision. Approximately a week later, the plaintiff was told by letter that, after investigation, the Commission had entered an order disapproving his certification to the position of patrolman and had struck his name from the eligible list and register. He did not receive a copy of this order; no reasons were given in the letter for this action of the Commission; and the investigation which it had conducted was not specified.

The plaintiff then filed his timely complaint in the Circuit Court of Cook County, pursuant to the Administrative Review Act, alleging the foregoing facts as well as stating that after receiving the letter of disapproval from the Commission, he had employed an attorney to ascertain the reasons for its action. He was informed

that the Commission's files contained a letter which was signed by the Director of Personnel of the Chicago Police Department in his official capacity and was addressed to the President of the Commission. The complaint went on to allege that this letter contained information which formed the basis of the Commission's questions to the plaintiff concerning the alleged results of a lie detector test which he had taken. The letter concluded with the recommendation of the Police Department that the certification of the plaintiff be withdrawn.

Continuing, the complaint alleged that at the time of his resignation in May, 1960, the plaintiff was assigned to the Summerdale Police District and, along with numerous other police officers, was subjected to intensive investigation; that the plaintiff cooperated fully in said internal investigation, submitted to a polygraph test, and testified before the County Grand Jury on two occasions; that the plaintiff resigned because of unfavorable publicity reflecting upon all personnel attached to the District and their families; and that there was no authority under Rule II, section 6 (Disqualifications from Civil Service) of the Commission nor was any competent, relevant evidence introduced against him at the hearing before the Commission which warranted its disapproval of his certification. In conclusion, the complaint prayed that, upon review of the transcript of the evidence supporting the order, the court would reverse the Commission.

The Commission filed an answer to this complaint and a transcript of the proceedings conducted before it. In its answer, it admitted most of the allegations contained in the plaintiff's complaint. It did deny, however, that it had no authority under its Rule II, section 6 to dis-

approve the plaintiff's certification and stated that the manifest weight of the evidence supported its order. Pursuant to order of court, a second hearing was held before the Commission on November 2, 1966, for the taking of such additional evidence as the parties wished to present. At this more formal hearing, both the Police Department and the plaintiff were represented by counsel. One witness testified for each side; direct and cross-examination were conducted by the attorneys; and documents were admitted into evidence. A transcript of these proceedings is also included in the record before us. The Police Department did not pursue the original line of inquiry as to whether or not the plaintiff had lied while taking a lie detector examination in 1960, but rather now attempted to demonstrate, over objection of plaintiff's counsel, that the plaintiff carelessly, even deliberately, mishandled evidence, a Polaroid camera, in 1959 which aided Richard Morrison in that it halted any further criminal prosecution of him for the burglary of this camera.

The only witness for the Police Department was Marcus McGill, a sergeant in the Department, who testified that the plaintiff's name was mentioned as a result of the police investigation into the statements and allegations made by Richard Morrison. The plaintiff was a detective on April 14, 1959, the night that Morrison and Jerry Bossuyt were arrested in the Summerdale Police District. The arresting officers were Handley and Gilmartin. The detectives involved as investigating officers were the plaintiff, Kann, and Norcott. The following property was found in Morrison's car: a Polaroid camera; bottles of liquor; cigarettes; and approximately $475.00 in coins. The arresting officers and the detec-

tives escorted Morrison, Bossuyt, and the seized property to the Summerdale Police Station where the evidence was inventoried. Through police channels, it was learned that the items matched a description of merchandise taken in the burglary of Carmen Sakol Motors, which was located in another Police District. Morrison and Bossuyt were then detained on a burglary warrant. Continuing, McGill stated that although the property seized should have been taken at the earliest possible time from the Summerdale Station to the Custodian's Office located in Central Police Headquarters, the merchandise remained at Summerdale for six days before it was sent to the proper place. In addition, the Polaroid camera was entered on Summerdale's Recovered Property Inventory Sheet without its serial number being listed. No detective placed his private marking on the camera either. Police records showed that at the end of May, 1959, the plaintiff removed the camera from the Custodian's Office and kept it out for five or six days.

A document was then admitted into evidence over the objection of the plaintiff. It was a written report dated February 16, 1960, and sent from the Custodian's Office, Lost and Stolen Property Section, to the Deputy Commissioner of Police for Staff Services. This official police report indicated that a patrolman assigned to the Custodian's Office, noticing that the Summerdale Police Station's Recovered Property Inventory Sheet did not contain a serial number for the Polaroid camera, also could not locate it when the camera was turned in by the Summerdale District. He sought help from another patrolman assigned to the Custodian's Office who found the serial number by lifting a metal flap on the front of the camera and noticing the serial number, P120-459,

stamped on the inside of this flap. This number was then entered on the appropriate police documents. The records in the Custodian's Office showed that the camera was removed on four occasions. These documents indicated which officer removed the evidence and when it was returned but apparently not who returned it. Officer Handley removed the camera on April 21, 1959, and it was returned the same day. Detective Glenn Cherry removed it on May 6, 1959, and it was returned the next day. The plaintiff took it out on May 27, 1959. The camera was returned on June 2, 1959. Finally, Officer Handley again removed it on September 24, 1959, and it was returned the same day.

On cross-examination, McGill testified that the plaintiff removed the camera from the Custodian's Office on May 27, 1959, so that it could be used in the court proceedings of that day. The witness went on to say that it was not normal procedure for a policeman to retain any evidence for five or six days after he had checked it out for use in court as the plaintiff had apparently done in this case. In conclusion, McGill stated that one of the plaintiff's partners at the Summerdale District in 1959-1960, Detective Kann, was still in the Police Department and had been promoted to sergeant.

The Police Department then introduced another document into evidence without objection from the plaintiff. This was a written statement taken from and signed by the plaintiff on March 22, 1960, in Central Police Headquarters and given to two investigating sergeants detailed from the Police Commissioner's Office. In his written statement, the plaintiff denied ever working with a burglar, knowing of any Chicago Police Officer who did work with one, receiving anything from a burglar

to conceal a crime, knowing of Morrison's activities with police officers before January, 1960, or being told by his partner, Kann, that Kann knew Morrison was working with policemen.

The plaintiff also declared in his statement that sometime after May 7, 1959, he had a conversation with his two detective partners, Norcott and Kann, in Kann's hospital room. There the plaintiff told the other two men that on May 7, 1959, he had appeared at a preliminary hearing in the Cook County Criminal Courts Building concerning the burglary of Sakol Motors for which Morrison and Bossuyt had been arrested. Also present were Officer Handley, who was one of the arresting officers; William Sakol, who was the complaining witness; and Barsy, the attorney for Morrison. This lawyer contended that his client had a receipt for the Polaroid camera taken from his car by the police in April, 1959, which would show that this camera was Morrison's personal property and not that of Sakol Motors. Morrison produced a receipt from Imperial Jewelers which also contained a serial number. This number was compared with the number on the camera. They were identical. The prosecution's complaining witness, Sakol, then stated that he had no receipt or bill of sale for the camera which would contain its serial number, but if the court would open the back of the camera, it would find there a positive of a picture taken by Sakol on Christmas, 1958. This was done. Upon examination, the court remarked that the photograph was hazy but it looked like Morrison's picture. Officer Handley, in response to the court's directive, sent the camera to the Police Crime laboratory for confirmation. The case was continued to May 27, 1959.

After this turn of events, Davern, Sakol, and Officer Handley engaged in a conversation outside the courtroom. The plaintiff asked Handley if he, as the arresting officer, had picked up the camera and brought it to court. Handley said no. Detective Glenn Cherry had volunteered to pick it up from the Custodian's Office on May 6, 1959, saying he would be down at Central Police Headquarters anyway on that date and would save Handley a trip downtown. Cherry brought the camera to Handley's home on May 6, 1959, and Handley brought it to court for the preliminary hearing on the following day. Following this conversation, the plaintiff and Norcott, one of his detective partners, went to Imperial Jewelers where the proprietor told them that he had sold a camera to Morrison in September, 1958, but he had no record of the sale nor of the camera's serial number. The proprietor also pointed out to Davern where the serial number could be found on a Polaroid camera. The camera's manufacturer also was contacted but it too kept no such serial number data.

In conclusion, the plaintiff mentioned in his written statement that he had no way of knowing if the Polaroid camera had been switched by someone. He saw no serial number on the camera when Morrison was arrested in April, 1959. He did not know of any serial number until May, 1959, at the preliminary hearing. The plaintiff took the Polaroid camera from the Custodian's Office to court on May 27, 1959, for the second hearing in this matter. Since he had to attend another trial concurrently with the Morrison hearings, the plaintiff was required to divide his time ebtween two courtrooms in the Criminal Courts Building. He left the camera in the possession of two men; Mr. Sakol, the complaining witness; and a detective, not from the Summerdale Station,

who was with Sakol that day and whom the plaintiff did not know. After making five or six trips between courtrooms, the plaintiff was advised by Sakol that Bossuyt had been discharged. The court had stated that the camera should be returned to Morrison although he was held over to the County Grand Jury apparently for the burglary of the liquor, cigarettes, and coins. Morrison was no longer present.

The plaintiff then took the camera to the Summerdale Police Station. He did not return it to the Custodian's Office on May 27, 1959, since, due to the lateness of the hour, the Custodian's Office might have been closed by the time he arrived at the Central Police Headquarters. Once back at the Summerdale Station, the plaintiff placed the camera behind a desk so that it could be taken to the Custodian's Office by the pickup wagon. The plaintiff did this on the Thursday before the Memorial Day weekend. If the pickup wagon failed to deliver the camera to the Custodian's Office on that Friday, it would be quite possible that the Custodian's Office would not receive it until the following Tuesday due to the intervening Memorial Day weekend. The plaintiff also stated that he was on a medical leave of absence on May 27, 1959, due to a physical ailment, and he might have personally returned the camera to the Custodian's Office on June 2, 1959, when he received his medical release. The plaintiff did not see the camera again until his next court appearance in September, 1959.

After this document was introduced into evidence, the Police Department rested its case. The only witness for the plaintiff was the plaintiff himself. He stated that during the five year period that he was a member of the Police Department before his resignation in May,

1960, he was never suspended nor were any criminal charges placed against him. He did earn two creditable mentions and thwarted an armed robbery during this period. Detective Kann, one of his partners at the Summerdale Station, received a twenty-nine day suspension for his activities in the Morrison case. Kann was now a sergeant. The plaintiff went on to say that another detective, Glenn Cherry, had been convicted of switching evidence in the Morrison case. The plaintiff only took the camera from the Custodian's Office on May 27, 1959. In conclusion, he stated that the Police Department did not delay his furlough, but they did delay the furloughs of some of the other officers from the Summerdale Station who were later discharged from the force.

This concluded the additional evidence which was presented to the Commission. The Commission made no findings of fact but filed its supplemental record with the Circuit Court for the latter's consideration. The court thereafter reversed the prior order of the Commission.

On appeal, the appellants contend that the Commission was correct in concluding that the plaintiff lacked the requisite character for appointment to the Chicago Police Department. It is therefore urged that the trial court erred in substituting its judgment for that of the Commission. In its brief the Commission discloses, for the first time, its reason for decertifying the plaintiff. It contends that the record in this case demonstrates that the plaintiff is of "bad character" within the meaning of Rule II, section 6 of its Rules which, although not defining the term, provides as follows:

> "Disqualifications. Proof . . . of bad character . . . shall be grounds for . . . omission or removal from an eligible register. . . ."

Specifically, the appellants contend that the plaintiff is of "bad character" because: (1) he did not place the Polaroid camera's serial number on Summerdale's inventory sheet; (2) he was one of the recovering officers and did not place his mark on the camera; (3) he removed the camera from the Custodian's Office on May 27, 1959, and it was not returned until June 2, 1959; (4) he was not the arresting officer and hence violated the rules of the Chicago Police Department by removing the camera on May 27, 1959; (5) he resigned while under investigation; (6) the records of the Police Department indicate that he lied in making certain answers to questions posed to him in a polygraph examination.

Although "bad character" is not defined in Rule II, section 6, it should be stated at the outset that the Commission must have the power to decide what is bad character in a particular case justifying the decertification of an applicant for a Civil Service appointment. In the statute controlling the discharge, in certain municipalities, of Civil Service policemen and firemen for "cause" [Ill. Rev. Stat. (1965), ch. 24, Sec. 10-2-17], "cause" is not defined by the Legislature. In interpreting this statute, reviewing courts have held that the administrative agency is to decide what conduct justifies cause for removal. When the administrative Review Act is invoked and the courts are asked to review a final decision of an administrative agency, the judiciary will not reweigh the evidence but will only determine if the border of discharge is not arbitrary but is just and reasonable in light of the evidence presented to the agency. Fantozzi v. Board of Fire & Police Com'rs., 35 Ill. App. 2d 248, 256, 182 N.E. 2d 577, 580 (1962); affirmed 27 Ill. 2d 357, 189 N.E. 2d 275 (1963). It is the duty of this court, as it was of the trial court, to examine the

evidence presented before the Commission and to determine if its order is supported by the manifest weight of that evidence. Drezner v. Civil Service Commission, 398 Ill. 219, 226-27, 75 N.E. 2d 303, 307 (1947).

The appellants first contend that the plaintiff's bad character is demonstrated by his failure to record the camera's serial number on Summerdale's inventory sheet. In this regard, it should be noted that the record fails to reveal why this duty should fall solely on the plaintiff. There were two arresting officers present at the scene of Morrison's arrest and two detectives participating in the investigation in addition to the plaintiff. Bad character is alleged only against the plaintiff although no one of these other four police officers thought to record the serial number either. Apparently, they are still on the police force. One of the detectives, Kann, has been promoted to sergeant.

In addition, it is undisputed in this record that the plaintiff did not discover the location of the serial number on a Polaroid camera until he himself interviewed the owner of Imperial Jewelers after May 7, 1959. Up until that time he only knew the identity of the camera found in Morrison's car as Model No. 110A. One of the police officers assigned to the Custodian's Office at Central Police Headquarters could not find the serial number when the camera was turned in on April 20, 1959. He had to seek help from another patrolman who discovered the number, somewhat hidden, inside the camera's flap, which first had to be lifted. The serial number was certainly not in plain view. It appears that a rather thorough and detailed examination was required to find it if one was unfamiliar with the camera. The record is silent as to why the duty to conduct such an

examination should rest solely with the plaintiff. It would be arbitrary and unreasonable to place this duty solely on him in the absence of evidence showing that the plaintiff was the dominant figure among the detectives and arresting officers when Morrison was apprehended on April 14, 1959. No such evidence is found in this record.

Moreover, the record does not contain the serial number which was read in court on May 7, 1959, and which was compared with Morrison's receipt and found to be identical. We do know that a certain serial number was found to be identical, but we do not know the identity of that serial number. If it was P120-459, then the camera was switched at the Summerdale Station during the six day period from April 14 to April 20, 1959, since P120-459 was the serial number of the camera turned in to the Custodian's Office on April 20, 1959. Consequently, Detective Cherry would not have switched the camera sometime between May 6 and May 7, 1959. Yet, it is undisputed that Cherry was convicted of switching evidence in the Morrison case and that he volunteered to pick up the camera for Officer Handley, the arresting officer, on May 6, 1959. The switch was discovered the next day. It is somewhat apparent that the switch was not made until after the camera had reached the Custodian's Office on April 20, 1959. It is therefore immaterial that the camera was kept at the Summerdale Station from April 14 to April 20, 1959.

After learning on May 7, 1959, at the preliminary hearing, of the apparent switch in the evidence, the plaintiff did not remain idle but rather attempted to discover the serial number of the camera sold to Morrison. It is undisputed that he interviewed the owner of Imperial Jewelers in an unsuccessful attempt to gain this

information. The manufacturer of the camera was also contacted but to no avail. This was diligent police work. On the basis of the totality of these factors, we find that the manifest weight of the evidence does not support the contention that the plaintiff's bad character is shown by his failure to record the camera's serial number on Summerdale's inventory sheet.

The appellants contend that the plaintiff's bad character is also shown by his failure to place a mark on the camera. Rule 339 of the Chicago Police Department provides, in relevant part, that "all property coming into police hands which may be used as evidence in a criminal case shall be properly marked by the recovering officer . . . ." The term "recovering officer" is not defined in the rule. Obviously, the recovering officer could be the arresting officer. In the instant case, two arresting officers and three detectives accompanied Morrison, Bossuyt, and the evidence to the Summerdale Police Station. The record is silent as to who was the recovering officer. It is clear that no officer or detective marked the camera found in Morrison's car although this would have aided in the detection of any subsequent switching of the camera. Again the appellants seem to contend that the plaintiff alone had the duty to mark this evidence. There were four other officers present, including two other detectives. The record is silent as to which of the detectives, if any, was the recovering officer and hence had the duty to mark the evidence. Neither of the other detectives, Kann nor Norcutt, was called as witnesses by the Police Department to explain who was the recovering officer on April 14, 1959. Officers Handley and Gilmartin, the arresting officers, also were not called as witnesses. If these men were unwilling to testify, the Commission could have

used its subpoena power under Ill. Rev. Stat. (1965), ch. 24, Sec. 10-1-18 to compel attendance. Apparently, all four officers are still on the police force. Kann has been promoted to sergeant. The police officer who did testify before the Commission, Sergeant McGill, offered no evidence on the point of who was the recovering officer on the night of Morrison's arrest. He merely testified that no detective placed his private marking on the camera. The evidence in this record does not support the conclusion that the plaintiff was the recovering officer and hence he had the duty to mark the camera. Thus, this contention is without merit.

It is also urged that the plaintiff's bad character was again shown when he removed the camera from the Custodian's Office on May 27, 1959, and did not return it until June 2, 1959. It is undisputed in this record that the plaintiff went to court on May 27, 1959, although on a medical leave of absence. He offered a reasonable explanation for the failure of the camera to reach the Custodian's Office until June 2, 1959, which explanation stands uncontradicted in this record. It was his testimony that he either returned the camera himself on June 2 after returning from sick leave or the pickup wagon failed to obtain the camera from the Summerdale Station on May 28, 1959, and this failure, coupled with the intervening Memorial Day weekend, resulted in the camera not reaching the Custodian's Office until June 2, 1959. Furthermore, the switch in the camera had been discovered on May 7, 1959, so that the plaintiff's later actions would not be relevantly connected to the alleged earlier mishandling of this camera by police officers which enabled the switch to occur.

The appellants also contend that the plaintiff's bad character is reflected by the fact that he removed the

camera from the Custodian's Office on May 27, 1959, in violation of Police Department Rule 338 since he was not the arresting officer. Rule 338 provides, in relevant part, that when property held as evidence is needed in court, the arresting officer may obtain it from the Police Custodian upon leaving the proper receipt and when the evidence is not disposed of in court, the arresting officer shall return the evidence to the Police Custodian. It is undisputed in this record that the plaintiff removed the camera from the Custodian's Office on May 27, 1959, although he was not the arresting officer. However, it his apparent from the record that the plaintiff did this because the arresting officers, Handley and Gilmartin, were not going to be present in court on that date for some undisclosed reason. The record reveals that the only parties present for the prosecution on May 27, 1959, were the complaining witness, Sakol, and the plaintiff. In light of this reasonable explanation for the plaintiff's action on May 27, 1959, it cannot be said that his alleged bad character was shown by the fact that he checked out the camera on that date although he was the arresting officer.

Also urged, as an example of the plaintiff's alleged character, is the fact that he resigned from the Police Department while under investigation. It is implied that he resigned as an alternative to charges being placed against him. There is no evidence of this in the record however. Sergeant McGill, the police department's sole witness, offered no testimony in explanation of the plaintiff's resignation. The documents offered into evidence are also silent as to this matter. Any witnesses or documents that the police department needed to prove its case against the plaintiff on this point could have been subpoened by the Commission pursuant to its power under Ill. Rev. Stat. (1965), ch. 24, Sec. 10-1-18.

On the other hand, the plaintiff offered a reasonable explanation for his resignation—unfavorable publicity affecting the police assigned to the Summerdale Station and their families—which stands uncontradicted in this record. It is undisputed that the plaintiff cooperated fully with the police officers investigating the Summerdale scandal and that he was never suspended from the force nor were any criminal charges ever placed against him. His detective partner, Kann, now a sergeant, did receive a twenty-nine day suspension for his activities in the Morrison case. The plaintiff always denied being involved in any of the Summerdale wrongdoing and received his furlough before resigning, although the furloughs of other police officers from the Summerdale Station, who were later discharged from the force, were delayed. Since there is no evidence in this record to support the contention that the plaintiff resigned while under investigation so as to escape charges being placed against him, this contention is without merit.

Finally, the appellants urge that the plaintiff's bad character is shown by the fact that the records of the Chicago Police Department indicate that he had received burglary proceeds and that he knew that his partner, Kann, was aware of police officers who were working with burglars. The basis of this contention is the letter sent to the Commission by the Director of Personnel of the Police Department containing the alleged conclusions of an unmaned polygraph operator that the plaintiff had lied in response to two questions asked of him during a lie detector examination. Since the letter was offered to prove the truth of the matters asserted therein but the unnamed polygraph operator, the out-of-court declarant, was not called upon to testify, this court is

faced with a hearsay situation arising in an administrative agency proceeding. The Police Department never tendered the results of the lie detector test to the Commission as additional documentary evidence. Such action would have raised the issue of whether such results are competent evidence in an administrative agency proceeding to show the bad character of a police officer. In Seneca v. Board of Fire & Police Com'rs., 71 Ill. App. 2d 219, 229, 217 N.E. 2d 320, 325 (1966), it was held that even if such results were competent evidence before an administrative agency, it would still be necessary to prove the qualifications of the person who administered the polygraph test. Such a foundation was not presented in the case at bar. However, because of the way in which the evidence was presented in this case, we are not called upon to decide this issue. Only the hearsay point is before this court.

In Novicki v. Department of Finance, 373 Ill. 342, 344, 26 N.E. 2d 130, 131 (1940), a suit by the Department of Finance for the assessment of a deficiency tax under the Retailers' Occupation Tax Act, it was held that hearsay is incompetent evidence in administrative agency proceedings. Involved in that case was a section of the Retailers' Occupation Tax Act which provided: "In the conduct of any investigation, or hearing, neither the Department (of Finance) nor any officer or employee thereof shall be bound by the technical rules of evidence . . . ." In its decision that the Legislature by this section did not intend to abrogate the fundamental rules of evidence, the court held that the rule against hearsay is a basic and not a technical rule of evidence and is based on the necessity of an opportunity to cross-examine the out-of-court declarant. Fantozzi v. Board of Fire & Police Com'rs., 35 Ill. App. 2d 248, 256, 182

N.E. 2d 577, 580 (1962); affirmed, 27 Ill. 2d 357, 189 N.E. 2d 275 (1963), a proceeding before an administrative agency to discharge a police officer for "cause" also held that hearsay is incompetent evidence and is inadmissible before an administrative agency. It is apparent from the cited cases that hearsay is not competent evidence in administrative agency proceedings. The trial court apparently came to the same conclusion and remanded the cause to the Commission for the taking of additional evidence. The appellants urge that the plaintiff waived any error by his failure to object to the admission of this hearsay evidence. Such a contention overlooks the fact that the plaintiff was not represented by counsel at this first hearing before the Commission and, more importantly, did not know that the alleged conclusions of the unnamed polygraph operator were contained in a letter from the Director of Personnel of the Chicago Police Department meaning that such purported conclusions were hearsay evidence and inadmissible.

The cases relied upon by the appellants are distinguishable from the instant case. The evidence in People ex rel. Jones v. Civil Service Commission, 17 Ill. App. 2d 36, 149 N.E. 2d 487 (1958); in Nolting v. Civil Service Commission, 7 Ill. App. 2d 147, 129 N.E. 2d 236 (1955); and in DeGrazio v. Civil Service Commission, 31 Ill. 2d 482, 202 N.E. 2d 522 (1964), was far more convincing than the evidence in the instant case. In Rose v. Civil Service Commission, 14 Ill. App. 2d 337, 144 N.E. 2d 768 (1957), the reviewing court held that a probationary patrolman was not statutorily entitled to a hearing before the Commission if, during his period of probation, he was discharged from the Police Department with the consent of the Commission after it had

received in writing from the head of the department, the reasons for such a discharge. So too in the instant case, the plaintiff will become a probationary patrolman for a period of time not to exceed six months [Ill. Rev. Stat. (1965), ch. 24, Sec. 10-1-14], during which time he could be discharged, with the Commission's consent, if the head of his department follows the procedure authorized in the Rose case. In Coursey v. Board of Fire & Police Com'rs. of Skokie, 90 Ill. App. 2d 31, 41, 234 N.E. 2d 339, 344 (1967), the court held that a chief of police has the inherent authority as well as the implied authority derived from a Police Department Rule in that case to order a patrolman, accused of wrongdoing, to submit to a polygraph examination in a case in which a citizen's accusations were denied by the police officer. Since the patrolman disobeyed this order of his superior officer, it was held that the administrative agency was correct in discharging him for insubordination. The case at bar does not involve a refusal to take a polygraph examination but rather hearsay as related to the taking of such an examination.

The appellants briefly contend that the plaintiff, an applicant for appointment to the position of patrolman, is not entitled to the procedural safeguards of a patrolman enjoying Civil Service status guaranteed him by Ill. Rev. Stat. (1965), ch. 24, Sec. 10-1-18. Such a contention tends to overlook the fact that the plaintiff did voluntarily receive a hearing before the Commission and was given an opportunity to be heard in his own defense. Furthermore, the appellants do not dispute the fact that the plaintiff has properly invoked the Administrative Review Act. In light of these circumstances, we find no merit in this contention.

We have reviewed all questions of law and fact presented by the record before us. It is our opinion that the trial court was correct in holding that the order of the Commission was against the manifest weight of the evidence. The judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, *J.*, and MCCORMICK, *J.*, concur.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1627

WILLIAM E. DAVERN, JR.,
Petitioner,

vs.

CIVIL SERVICE COMMISSION OF THE CITY OF CHICAGO, AND ORLANDO W. WILSON, SUPERINTENDENT OF POLICE OF THE CITY OF CHICAGO,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF ILLINOIS.

BRIEF FOR RESPONDENTS IN OPPOSITION.

RICHARD L. CURRY,
Corporation Counsel of the City of Chicago,
511 City Hall, Chicago, Illinois 60602,
Attorney for Respondents.

EDMUND HATFIELD,
HOWARD C. GOLDMAN,
Assistant Corporation Counsel,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

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QUESTIONS PRESENTED FOR REVIEW.

1. Can the petitioner seek a writ of certiorari when he has failed to raise any questions under the Constitution of the United States in the court below?

2. Did the Supreme Court of Illinois properly decide that the manifest weight of the evidence justified the Civil Service Commission in decertifying and removing petitioner's name from the eligible list for the position of patrolman in the Chicago Police Department?

REASONS FOR DENYING THE WRIT.

In the court below the petitioner did not draw in question the validity of a state statute on the ground of its being repugnant to the Constitution, treaties or laws of the United States, as required under 28 U. S. C. § 1257 (3).

Although the petition herein (p. 2) contains the affirmative statement that questions under the United States Constitution were raised in the court below, as required under 28 U. S. C. § 1257(3), the record shows this to be incorrect. The petitioner did not raise any federal constitutional question either before the Supreme Court of Illinois, the Appellate Court of Illinois, First District, the Circuit Court of Cook County, Illinois or the Civil Service Commission.

The only hint of any constitutional issue the petitioner made in the court below was in the Petition for Rehearing filed with the Supreme Court of Illinois after it rendered its decision. On page 5 of the Petition for Rehearing the following appeared: "Not only is this a violation of the court's proper function under the Administrative Review Act, but it involves the court in an unconstitutional function by having it usurp the responsibilities belonging to the executive branch of the Government". On page 6 of the same Petition the following was stated: "It is submitted that this Court cannot sustain an alleged order unsupported by findings or conclusions of fact, and that its present opinion in attempting to supply these findings of fact, unconstitutionally involves this Court in the administrative process."

The statements recited hereinabove from the Petition for Rehearing filed in the Supreme Court of Illinois do not bring the petitioner within this Court's jurisdiction, for the following reasons:

1. Questions under the United States Constitution sought to be reviewed were neither raised timely nor properly in the court below.

2. The suggestions of constitutional issues raised in the Petition for Rehearing to the Supreme Court of Illinois, besides being mentioned after the fact, that is after the court had rendered a decision, were, in addition, at best, a mere inference and did not bring the federal claim to the court's attention with fair precision (*New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, 67).

In *Oxley Stave Co.* v. *Butler County,* 166 U. S. 648, 655, this Court declared:

> ". . . the jurisdiction of this Court to re-examine the final judgment of a state court cannot arise from a mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

3. In Illinois, as in most states, it is the duty of a person, whenever he regards his constitutional rights as invaded, to raise an objection at the earliest fair opportunity and the failure to do so amounts to a waiver of the right (*Village of Riverside* v. *Kuhne,* 397 Ill. 108, 110 (1947); *Shoal Creek Coal Co.* v. *Ind. Com.,* 300 Ill. 551). The right to raise a federal question is dependent upon the state law (*Michael* v. *Louisiana,* 350 U. S. 91). Since the instant petitioner did not meet the Illinois rule which requires the raising of the issue at the earliest opportunity the petition for certiorari should be denied. Point I of the petition asserts that the Civil Service Commission violated petitioner's rights to due process (Petition, p. 9). As shown herein above, this claim was not even suggested before the Commission, the Appellate Court of Illinois nor before the Supreme Court of Illinois; it is raised for the first time in this Court.

4. The petitioner in an apparent attempt to extricate himself from the position he is in, namely, the failure to raise a constitutional issue below, now argues that the Supreme Court of Illinois unconstitutionally made an independent determination of facts (Petition, p. 17). It is apparent that petitioner has not only misread but has, in addition, misinterpreted the opinion rendered in the Supreme Court of Illinois. The Circuit Court of Cook County decided that the judgment of the Civil Service Commission was against the manifest weight of the evidence. The Appellate Court of Illinois sustained the Circuit Court. The Supreme Court of Illinois, as was it duty and right, reviewed the record and decided (Petition, p. 7a):

> "The appellate and circuit courts incorrectly found the Commission's actions to be against the manifest weight of the evidence. The judgments are accordingly reversed and the cause remanded to the circuit court of Cook County with directions to confirm the Commission's order striking plaintiff's name from the eligible list."

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

RICHARD L. CURRY,
Corporation Counsel of the City of Chicago.
511 City Hall, Chicago, Illinois 60602,
Attorney for Respondents.

EDMUND HATFIELD,
HOWARD C. GOLDMAN,
Assistant Corporation Counsel,
Of Counsel.

May 11, 1971.